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In The
Supreme Court of the United States
October Term, 1992

THE STATE OF MISSISSIPPI, ET AL.,
Petitioners,
v.

THE STATE OF LOUISIANA, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENTS

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STATEMENT OF THE CASE

Petitioners correctly state that this case involves the boundary between the States of Mississippi and Louisiana in the vicinity of an island located in the Mississippi River known as "Stack Island" or "Island No. 94". However, the only true island in existence in the vicinity of the boundary claimed by petitioners is an extremely large island which has developed adjacent to the geographic location of original Island No. 94. This island is clearly shown on various Louisiana exhibits, such as LA-1A, a U.S. Geological Survey Quadrangle Map¹. Also shown on the map is the 1881 location of the island patented to petitioners in 1888, being only 117.96 acres in size at the time. Later, it washed away entirely as shown by the ample testimony, documentary evidence and holding of the trial court in this case. See page 3, *infra*. That court, of course, also held that the island had migrated across the river, but did not discuss the "new" island in the river at the location of Island No. 94 in 1881.

Petitioners never address the principal object of their claim – the accretion along the west bank of the river at Lake Providence, Louisiana. They are quite careful to avoid detailed factual matters and confine the argument largely to legal principles found in the case law, without applying them to the specific facts of this case.

The accretionary features claimed by petitioners are a part of the west bank of the Mississippi River at Lake Providence, Louisiana (P-1, P-2, LA-1, LA-1A) and are entirely different formations from Island No. 94. They are

¹ J.A. 135

located in a different geographic vicinity; they have different histories of origin; they are different in size and shape; and at all times since their formation in the 1930's, have been west of the boundary between the States of Louisiana and Mississippi. They are connected to and are a part of the Louisiana bank and have no island features whatever, except at extreme high water. The designation of these accretions as "Stack Island" on some maps is apparently due to the work of draftsmen seeking to give the area a name.

While petitioners are asserting ownership to this bank accretion on the Louisiana side, they have carefully avoided any discussion of it from the very outset of the case. Even now, petitioners' brief does not mention, much less explain, how this bank accretion could be Island No. 94.

As pointed out at page 4 of Respondents' Brief In Opposition to the Petition for Writ of Certiorari, there are actually two separate geographic locations at issue, to wit:

- (1) The accretion to the west bank of the river at Lake Providence has sometimes been referred to as "the island" or "Stack Island", as it appears to be an island at extreme high water; and
- (2) The "new" island which has developed at the precise geographic location of original Island No. 94 is known as "Stack Island".

The trial court also avoided discussing the fact that there are two separate geographic locations at issue by not specifically referring to them. However, under cross-

examination the plaintiff's expert, Austin Smith drew a sketch on P-2² of the accretion against the west bank of the river. (Tr. 409-410) and on P-1 drew the original Stack Island as of 1881. (Tr. 412) His testimony shows that prior to the avulsion of 1881, the island was located geographically in T 11 N, R 9 W of the Choctaw Land District, Mississippi, while the accretion against Lake Providence on the west bank of the river is located in T 21 N, R 13 E of the Red River Land District, Louisiana. (Tr. 412) Further, Austin Smith admitted that the original Island No. 94 and "Stack Island" which has accreted to the west bank, as claimed by petitioners are not "one in the same", as he had earlier testified. (Tr. 461-463)

The district court referred to the "migrating Stack Island" in the bench opinion of June 23, 1989, page 16. That court correctly found, as Louisiana contends, that the island "was eroding and accreting and migrating generally in a southwesterly direction, by 1954 had moved out from under any portion of the superimposed original island and therefore had disappeared * * *".

The State of Louisiana and the Lake Providence Port Commission contend, as set forth in paragraph 7(d) of the Pre-Trial Order filed herein (Tr. 664-665), that Island No. Ninety-four (94) in the Mississippi River patented by the United States on December 29, 1888 to Stephen B. Blackwell, located in Township 11 North, Range 9 West of Choctaw Meridian in Mississippi, containing 117.96 acres

² J.A. 128. Refer to original exhibit as this appendix exhibit does not contain the sketch.

was eroded away by the natural processes of the Mississippi River, subsequently re-formed and exists near its location at the time of the federal patent. It is not, however, to be confused with accretion to the west bank.

Petitioners' claimed boundary is drawn along a former bank line on the Louisiana side of the river. In this reach of the river, following completion of dike works construction by the Mississippi River Commission during 1881-1882, the river moved suddenly and avulsively from a channel east of Stack Island and commenced a slow westerly migration. It cut heavily into the west bank and then moved easterly again, re-building the eroded sections of land on the Louisiana side. The bank accretion occupies geographic space patented out by Louisiana, taxed by Louisiana and owned and possessed by Louisiana residents. As shown by Pl. Ex. 64 (J.A. 75), the certificate of the Chancery Clerk of Issaquena County, Mississippi, any taxes paid by petitioners were for lands on the east bank located in Section 27, T 11 N, R 9 W of the Choctaw Land District in Mississippi. Conversely, the Louisiana citizenry paid taxes on lands within T 21 N, R 13 E of the Red River Land District in Louisiana, being the riparian sections of land with accretion fronting on the west bank of the river. This is clearly shown by La. Ex. 37 and accompanying stipulation (Tr. 827-832) among counsel to the general effect that the accretion claimed by petitioners on the west bank attached to riparian lands in Louisiana and was possessed by Louisianans, who paid taxes on it.

Petitioners' expert, Austin Smith, drew a boundary generally along the Louisiana levee on the west bank in order to capture ownership of both the accretion to the

west bank, as well as the new and extremely large island located in the river itself in the vicinity of the 1881 island. The accretion to the west bank has been assimilated into the land mass along the west bank, and was so found even by the district court. In its Bench Opinion of June 23, 1989, the court found that this accretion to the "Louisiana shore" is "for large portions of the year completely dry between what is called the island and what is called the high bank on the Louisiana side", making it a part of the bank.

Petitioners have been claiming possession, jurisdiction, and sovereignty of both the land accreted to Louisiana and to the "new" Stack Island near Mississippi. Hence, the Fifth Circuit characterization of the boundary dispute as "treacherous".

In the district court and the Fifth Circuit, petitioners have claimed that two avulsions occurred in the Mississippi River in the vicinity of Lake Providence, but failed at trial to present testimony or evidence of either. The Lake Providence Reach of the river is straight in its alignment, making an avulsion extremely unlikely without the intervention of man-made works, such as the 1881-1882 Mississippi River Commission dike project which Louisiana clearly established from U.S. Government documents. The avulsion caused by the dike project is the only one which has occurred in this reach of the river in recorded history since long prior to the time of sovereignty of the two states.

Petitioners' theory of the case changed dramatically after the decision by the Fifth Circuit. This was pointed out in both Respondents' Answer to the Petition for the

Rehearing to the Fifth Circuit, at page 1, and in Respondents' Brief In Opposition to the Petition for Writ of Certiorari, at page 6.

In the original Complaint to Remove Cloud, filed in the district court, paragraphs 55 to 58, petitioners describe river actions commencing "about 1908" as being avulsive in nature and having the effect of fixing the boundary. This position is explicitly re-stated in the Proposed Findings of Fact and Conclusions of Law of petitioners (J.A. 47, 55, 61), including the State of Mississippi. These same contentions comprise the claims of the individual petitioners and the State of Mississippi in the Pre-Trial Order in this case. There is no reference to earlier periods of time, except as to when Island No. 94 was surveyed, 1881, and patented, 1888.

Petitioners did not offer available evidence or testimony to show the locations of Island No. 94 as it periodically appeared, disappeared and re-appeared from earliest known times, although respondents had listed such evidence in the Pre-Trial Order.

The May 19, 1992 Brief For Petitioners represents a clear departure from previous positions: it now suggests that the thalweg-boundary between the states forms at the time of admission to the Union (pp. 6, 10-11, 13, 15, 16-17). In earlier pleadings, petitioners' simply eluded to the "time of the formation of Stack Island," without any elaboration.³ This shows petitioners could not document or identify the precise time of formation, nor can they now.

³ See, for instance, Proposed Findings of Fact and Conclusions of Law of petitioners, paragraphs 1-3. (J.A. 47, 55, 61)

During the trial at Vicksburg, there was neither emphasis on the location of the thalweg as of 1812 nor any development (by Mississippi) of the historic processes at work for the formation of Stack Island. The only evidence Mississippi presented at trial even remotely suggestive of the matter of the existence of Stack Island in 1812 was the 1826-27 township survey which included a simple sketch of "Stack Island" in the Mississippi River. This land district survey, with its Louisiana counterpart, was introduced with no comment concerning a possible 1812 boundary-thalweg, nor is any shown on the survey since it was made for land patent purposes and not as a hydrographic or river survey.

Closely related to the previous item, Mississippi now repeatedly claims that its introduction of the 1826-27 surveys provides the only evidence of the boundary-thalweg or location of Stack Island prior to 1881. Indeed, petitioners maintain - again, repeatedly - that this evidence was "uncontradicted" by Louisiana. Apart from the reality that Louisiana was prepared to introduce considerable evidence, as reflected by its pre-trial list of exhibits concerning the pre-1881 thalweg if the matter had been properly raised by Mississippi, the 1826-27 to 1881 Stack Island thalweg now claimed by Mississippi received adequate contradiction by Louisiana's description of geomorphological and geographical processes involved in the formation(s) of "Stack Island" and by the Humphreys & Abbott map of 1861, LA-8, as well as the 1860-1930 comparison map prepared by the Mississippi River Commission, LA-32H. (J.A. 174) See also the Fisk

materials introduced at trial as LA-32G.⁴ Louisiana clearly demonstrated that in this reach of the Mississippi River, "Stack Island" and related accretionary features constituted "sand deposits in which" the river freely migrated. See also, Fisk. Accordingly, the general area location of "Stack Island" experienced the formation of several islands, sandbars, or shoals over the course of time. Therefore, the current Mississippi position is not only newly conjectural, but also a misrepresentation of the record.

Petitioners built their entire case upon the allegations set forth in the Complaint to Remove Cloud, essentially contending that at least two avulsions in the Lake Providence Reach of the river had the effect of freezing the thalweg-boundary along the present Louisiana levee. Petitioner's expert, Austin Smith, could not describe or document the claimed avulsions at trial, only a gradual migration of the river from east to west and back again. His testimony about the floods of 1912 and 1913 working avulsive changes to the east chute channel was invalidated by Louisiana evidence, LA-16 and LA-16A⁵, showing the change had already occurred by gradual processes as early as 1908. Thus, no avulsive act was shown to support petitioners' claims. Petitioners did not list or use the exhibits relied upon by Louisiana in the pre-trial order, particularly, items LA-1 through LA-8, LA-10, LA-13, LA14, LA-16, LA-16A, LA-18A, LA-19,

⁴ J.A. 167 "Geological Investigation of the Alluvial Valley of the Lower Mississippi River," made for the War Department, Corps of Engineers, U. S. Army, by Harold N. Fisk, PH.D. Text with map.

⁵ J.A. 138. Official maps of the U.S. Geological Survey, the State of Louisiana, and the Fifth Louisiana Levee District.

LA-21, LA-32G, LA-32H, and others which establish accurately the fact that Island No. 94 was not in existence at the time of sovereignty of either state, periodically disappeared, and was west of the thalweg boundary as of 1879, prior to patent. These exhibits were exchanged with petitioners and were freely available for use, but were damaging to their position. Hence, they were not used by petitioners, whose expert, Smith had no explanation for them, such as LA-16, LA-16A and LA-18A.

SUMMARY OF THE ARGUMENT

Petitioners now argue for a thalweg-boundary as of the time of the admission of the states into the Union, without having previously specified the dates of admission or offered any evidence which might support such a finding. This new "time of sovereignty" theory is misleading for three reasons. First, the formation known as Island No. 94 was not in existence at the time of sovereignty of either state. Secondly, it periodically washes away and reforms anew in a different location. Third, all known evidence favors placement of both Island No. 94 west of the thalweg-boundary as of 1879, as well as the new island on Louisiana's side of the frozen thalweg-boundary. The accretion to the west bank belongs to the riparian owners in Louisiana.

Petitioners also contend, alternatively, and the district court held, that if they have not proved title to the accretion to the Louisiana bank as being Island No. 94, then it should be awarded to them under the doctrine of acquiescence. The Fifth Circuit properly held that a few "isolated incidents do not constitute a 'long-continued and uninterrupted assertion of dominion and jurisdiction over an area . . .'" 937 F.2d at 253.

The appellate court was quite correct in its findings, as shown by the ample testimony in the record.

Petitioners did not raise any issue concerning a pre-1881 thalweg-boundary in the trial court or the Fifth Circuit and certainly offered no evidence to support such a contention. After the Fifth Circuit decision, this argument came forward in the application for re-hearing. The issue was simply not addressed by petitioners in the trial court, although Louisiana had listed ample evidence to refute such a contention in the event the matter was raised.

Louisiana's intervention and third-party complaint were properly before the district court, but it had no power to exercise jurisdiction to affect title to land in Louisiana.

Boundary cases between states are one type of controversy where, ultimately, final adjudication and relief may be had only before the Supreme Court.

ARGUMENT

I. The Historical Evidence and Petitioners' New "Time of Sovereignty" Theory

Petitioners contend that P-1 (J.A. 127), the 1826-27 U.S. Survey, is the earliest evidence *in the record* showing the location of Stack Island (emphasis ours). This is true, because petitioners did not introduce more relevant maps closer to the time of Louisiana's sovereignty in 1812, which would show that Island No. 94 was not in existence at the time.⁶ As will be shown below, this map and

⁶ See Respondents Answer to the Petition for rehearing to the Fifth Circuit, pages 3 et seq.

the others cited by petitioners are not relevant under any theory and do not support the new "time of sovereignty" theory suggested in the Brief for Petitioners.

Petitioners might have used the 1821 "Map of Reconnaissance of Mississippi River", by Captain H. Young and Captain W.T. Poussin (LA-3A) which clearly shows no Island No. 94 at that time. Sandbars, however, are shown on Louisiana's side of the navigation channel between Islands 93 and 95, being a subsequent location for Island No. 94 in *Louisiana waters*. Thus, this map favors Louisiana and was not used by petitioners, who pursued a 1930's avulsion theory at trial.

Petitioners might also have selected the 1818 edition of "The Navigator", LA-3, very near the year of Louisiana's admission into the Union. Island No. 94 did not exist at that time, having been washed away in 1811 or 1812 by an enormous earthquake or by floods. It is quite clear that the island has been "sunk by the earthquake [1811-1812] or swept off by the floods", including the bar which had existed below it.⁷

Mississippi was not admitted into the Union until 1817, being a territory prior to that time. If the critical date for the location of Stack Island in Mississippi relates to the time of state sovereignty, it would relate to the sovereignty of Mississippi and not Louisiana. Since Stack

⁷ See *Lloyd's Steamboat Directory, and Disasters On the Western Waters*, documenting the great earthquake of 1812 and floods, attached as Item 2 in the Appendix to respondents answer to the petition for rehearing to the Fifth Circuit filed by petitioners herein.

Island was not in existence at that time, the date of Mississippi's sovereignty would not be relevant.

Petitioners argue that the 1867 Meriweather map (Pl. Ex. 3; J.A. 129) shows the island located in Mississippi, but that time period is not relevant under petitioners' own theory that the time of Louisiana's sovereignty is "the critical time." Quite importantly, what is argued to be Stack Island in 1867 is shown as accretion to the bank and not a separate island formation at all.

Petitioners argue that the 1874 reconnaissance map of Major Suter (Pl. Ex 4; J.A. 130) is important and that it shows Island No. 94 as "land in place". Counsel for Petitioners may not be aware that the Suter survey was merely a "reconnaissance survey" made from the Pilot House of the board on which Major Suter was riding downstream, and does not purport to be an accurate survey at all, but, again, only a sketch for the purpose of estimating the costs of improving certain routes along the river⁸. At that

⁸ The report of Major Charles R. Suter, Corps of Engineers, dated February 18, 1875, issued from the Engineer Office, United States Army, reporting to Congress concerning its appropriation of \$200,000.00 for surveys and estimates for the improvement of certain routes recommended by the Senate Select Committee on Transportation Routes to the Seaboard advises that "An engineering party was placed on one of the Government streamers and sent into the field, with instructions to sketch the river carefully from pilot-house of the steamer . . . " It also states that "Although the information obtained by this reconnaissance is not sufficiently detailed or extensive to allow estimates of the cost of the improvement recommended to be made, yet it will, I hope, be sufficient to point out the nature of the improvement required, and the means by which it can be effected." At page 496.

time, as in 1867, the formation previously known as Island No. 94 had become a *low water elevation sand bar* solidly accreted to the eastern bank. It was no longer an island at all and did not show at high water.⁹

The 1879 Suter map (Pl. Ex. 5; J.A. 131) is very similar, showing the sandy accretion attached to the bank in the 1874 survey to be now separated at low water by the east chute channel, and now numbered Island No. 94. As detailed in the Mississippi River Commission Report to Congress, LA-18A (J.A. 143), river action had caused the chute channel to develop to such an extent as to carry the main navigation channel of the river. In fact, as detailed by the Mississippi River Commission's report discussed in the decision of the Fifth Circuit in this case, the river was eroding the bank to such an extent as to threaten to scour away significant land areas, giving rise to the need for dike works to divert the river out of the east channel and away from the bank.

As correctly described by the Fifth Circuit in its opinion of August 5, 1991:

"Thus, the boundary remained frozen in the east channel, where it lay at the time of the patent in 1881, regardless of the nature of any shift in the river's course. *Hogue*, 69 F.2d at 168.

937 F.2d at 252

⁹ Reconnaissance Surveys were conducted during the low water months of the year October, November, December, so as to describe the conditions of the river at the most difficult times for navigation. At high water, many sandbars, shoals and other conditions revealed at low water stages would be obscured by high water and not of significance to vessels on the river, as in the case of the remnants of Island No. 94 as of that time.

None of the maps introduced or argued by petitioners are within the time period cited as relevant by petitioners, the new "time of sovereignty" theory. Proper maps were available, but not used.

Petitioners' argument clearly fails if it is intended to suggest that at the time of Louisiana's sovereignty, Stack Island was surveyed as being within the territory of Mississippi or that it was in Mississippi at the time of its sovereignty. In fact and in law, as shown by the maps discussed above, Island No. 94 did not exist at either time. After its formation in later years, its ownership was in the U.S. government and it was not patented out until 1888. Consequently, its location at the time of patent is the only relevant time frame.

Petitioners argue that the 1826-1827 U. S. Survey is important and that it shows Stack Island east of the boundary channel. In fact, this government Township Plat was made for *land patent purposes*, does not purport to be a survey of the river, and shows only the *sketched-in* banks of the river as the western boundary of the Choctaw Land District, Mississippi. Contrary to petitioners' assertion at page 12 of their brief, no boundary channel is shown on the survey. Consequently, petitioners again misrepresent the evidence and the record of the case. This land district survey does not purport to be a river survey or hydrologic survey in any regard, does not locate the boundary channel and does not show the island's position with respect to the channel, as claimed by counsel. As discussed above, maps made both before and after this land district survey (1826-1827) trace the disappearance, reemergence and changes in Island No. 94 until the east chute channel became the dominant course of the

river in 1879, leading to the Mississippi River Commission project funded by Congress.

Petitioners argue that the 1828-29 U.S. Survey (Pl. Ex. 2; J.A. 128) clearly shows "no island" on the Louisiana side of the channel. Actually, as in the case of the 1826-1827 Township Plat, the banks of the river are only *sketched in* as the eastern boundary of the Land District North of the Red River, Louisiana, this land district survey not being a survey of the river at all. No sand bars or islands are shown in this reach of the river on either side. This was not the purpose of land district surveys.

As discussed above, periodic changes in the river had the effect of radically changing the form and location of Island No. 94 between 1811-1812 and 1881, and lead to its total disappearance by around 1943.¹⁰

Petitioners state the general rule at page 10 of their brief that the "boundary is established on the date the state is admitted to the Union." This rule, of course, admits of both definition and exceptions, such as where a boundary may be fixed by pre-statehood treaty, by subsequent changes in rivers, by interstate agreement or by judicial decree.

A significant problem in applying the general rule is the determination of the precise location of the boundary, exactly the situation now before the Court. Petitioners would like to show the boundary to be west of Island No.

¹⁰ For a thorough discussion of the evolution and eventual disappearance of Island No. 94, see Original Brief of State of Louisiana and Lake Providence Port Commission, Intervenor-Appellants, filed with the Fifth Circuit, pages 10 to 29.

94 at the time of sovereignty of either state, but as discussed above, pages 10-14, *supra*, all known and available evidence shows the island was not in existence at the time of Louisiana's admission, 1812, nor of Mississippi's, 1817. The island was known to exist prior to Louisiana's admission, but was washed away in 1811 or 1812 by the great earthquake or by floods.

Counsel for petitioners argues, quite cavalierly, at page 12 of the brief that the 1826-1827 U.S. Township Survey of T 11 N, R 9 W, Issaquena County, Mississippi¹¹ proves up the case. This has apparently become petitioners' single most important item of evidence, purportedly establishing Island No. 94 "east of the boundary channel". However, the exhibit shows no navigation channel, no boundary channel and no hint of the downstream track of navigation. Petitioners' arguments are clearly without evidentiary support. The true purpose of these government surveys has been repeatedly discussed during the course of this case, has been briefed at the Fifth Circuit, and is described above at pages 14 and 15. Other than showing a sketch of an island formation in existence as of 1826-27, the exhibit has no probative value for petitioners, nor does P-2 (J.A. 128), the corresponding land district survey on the Louisiana side of the river.

As discussed at page 12, above, Pl. Ex. 3 (J.A. 129), the 1867 Meriweather map, shows what is argued by petitioners to be Stack Island, without name or number, to be accretion to the Mississippi bank. Pl. Ex. 4 (J.A. 130), an 1874 reconnaissance, shows that substantial additional

¹¹ Pl. Ex. 1, J.A. 127

accretion has attached to the bank, but that the island has re-formed downstream adjacent to Lake Providence, Louisiana. At this time, 1874, there is no island at the location of the 1881 survey of Stack Island.

As shown by Pl. Ex. 5, the 1879 Suter map, the 1874 accretion has now been severed by a rapidly enlarging chute channel. This led to the dikes construction program of the Mississippi River Commission which was the subject of the Fifth Circuit opinion.

The Fifth Circuit, in formulating its decision in this case, reviewed the entire record of the case and concluded, in part, as follows:

In reaching its conclusion, the district court relied primarily on the interpretation given by Austin Smith, Mississippi's only expert witness, of information contained in an 1881 shoreline survey. The district court considered the surveyor's notation of a "good deep channel" to the west of the island, and Smith's testimony that depth was the determinative factor, as persuasive evidence of the dominance of that channel. It also noted the presence of a government navigation light on the west bank of the river near the island, concluding that light served to guide river traffic from the head of Stack Island down the west channel. Without elaboration, the court pronounced an 1881 survey accompanying a Mississippi River Commission (MRC) study inconclusive, and declined to consider it in formulating its findings. Although we acknowledge that the district court's findings are entitled to deference, after our review of the evidence we are "left with the clear impression

that an error has been made." *Stauffer Chemical Co. v. Brunson*, 380 F.2d 174, 181 (5th Cir. 1967). (Emphasis ours)

937 F.2d at 251

The Fifth Circuit clearly points out the fundamental error of the trial court in disregarding essential and controlling items of evidence. Primarily, the trial court ignored an historical and unassailable technical document, the printed report of the Mississippi River Commission (MRC) contained in a congressional document reviewing the status of several projects funded by Congressional appropriation. In this instance, the report described in detail the location of the main navigation channel at Stack Island in 1881 as being in the east chute channel. The purpose of the project was to divert the river to the west of Stack Island. The report chronicles construction efforts, problems encountered, and the ultimate diversion of the Mississippi out of the east chute channel, "as shown by the high-water survey of April 1883". (J.A. 154) The report was accompanied by two maps prepared from an 1881 and 1883 hydrographic surveys with a map legend explaining water elevations, dikeworks, bank and shoal information and, most importantly, the tracks of navigation as of December, 1881, and September, 1883. These maps are LA-18A, colored to emphasize the technical data portrayed for the two time periods of the surveys. (J.A. 163, 164).

The report and maps were carefully explained by Louisiana's experts, as follows: Dr. Ernest S. Easterly, III (Tr. 633-637); Mr. Hatley Harrison (Tr. 697, 707, 713-718) There was no contrary testimony or documents offered and the explanations contained in the report are unrebutted.

It is clear beyond any doubt that the construction work was to force "the main channel of the river to the right of the Island and building a bar to the head of Stack Island, as shown by the high-water survey of April, 1883." (J.A. 154, 155) This project commenced in 1881 as one of the first projects of the Mississippi River Commission to divert the main channel of the river from the east chute channel of Stack Island to the west or to the right of the island to prevent further bank caving on the Mississippi shore and to provide a good stable channel to the west of the island.

It is clear from the 1879 surveys discussed above, that as of 1879 through 1881, the main channel of the river was in the east chute. Immediately upon completion of the construction of the dikes, "the channel of the river" was forced out of the east chute channel "to the right of the island and building a bar to the head of Stack Island, as shown by the high-water survey of April, 1883." (J.A. 154)

Based upon review of this evidence, the Fifth Circuit further held that:

We recognize that it is not within the province of the reviewing court to second-guess the district court's assessment of Smith's credibility as a witness. However, it is apparent that Smith disregarded the only conclusive pieces of evidence in formulating his opinion. The first such piece of evidence is the hydrographic survey completed in December of 1881 pursuant to a major Congressionally-funded MRC improvement plan. That plan, for which Congress appropriated nearly one million dollars, was designed in part to improve navigation in the

vicinity of the Lake Providence reach. The report issued in 1883 at the conclusion of the project clearly designates the east channel as the "main channel" at the time of the December 1881 survey. For example, the report lists as one of the "general effect[s] of the work" the "closing of the main channel of the river . . . and bringing it back to the [downstream] right of Stack Island by a system of deflecting dikes."

The report continues:

. . . In order to force the main channel of the river which flowed down the [east channel] . . . a main dike . . . was driven from a point below the foot of Baleshed Bar to the head of Stack Island, leaving the low water main channel from Longwood through the [east channel] open for the passage of boats. (emphasis added) (See J.A. 154)

This district court also ignored the hydrographic data contained in an MRC survey depicting the topography and hydrography of this portion of the river in 1881-82. While those data indicate the presence of shoals near the northern end of Stack Island in the west channel, the hydrographic soundings depict ample depths, even at low water, for typical river traffic in the east channel. Given these facts, it is illogical that vessels would employ a route that was not only approximately one mile longer, but also marked by treacherous shoals.

It is to be noted that the Fifth Circuit specifically found and held, by the language quoted above, that Mississippi's expert witness, like the district court itself, "disregarded the only conclusive pieces of evidence in formulating his opinion". The lower court simply

adopted Smith's erroneous interpretation of available evidence, even though the correct evidence was offered, explained, admitted by Louisiana and went unrebutted.

After reviewing and rejecting the inconclusive evidence upon which Smith relied, the Fifth Circuit stated:

Thus, we find the court clearly erred in relying upon evidence, that regardless of its veracity, could not support its finding.

937 F.2d at 252

The two surveys shown on the map which is a part of LA-18A (J.A. 143) clearly show that the main channel of the river was flowing east of the island at the time the island was patented to Stephen B. Blackwell, based on the 1881 hydrographic surveys. The sudden, perceptible and avulsive diversion of the river from the east chute channel to the west had the legal effect of freezing the boundary in the east chute channel. There is no record of any other sudden, immediate or avulsive changes in this reach of the river from 1881 until the present date. The only other changes were the typical slow, gradual and meandering changes of the Mississippi over the course of time and during periods of high water. The river has never breached its banks, cut through the levees or made a cutoff loop of the river at any time pertinent to the issues of this case in this region. Petitioners claim avulsive actions of the river favored a westerly track of navigation, as discussed above, but never produced any testimony or evidence to support this claim. Parenthetically, no testimony or evidence was offered to show Island No. 94 was in existence "at the time of sovereignty", nor where the thalweg-boundary may have

been located. The island was not formed until shortly before its patent out of the United States, and consequently, that becomes the only relevant time for consideration of the application of the rules of law pertaining to river boundaries.

Therefore, petitioners' argument at page 16 of their brief that Louisiana had the burden of proof totally fails. Actually, petitioners admit that their only evidence of the claimed location of the island in 1812 was the 1826 land district survey, but this issue was not raised by them in the district court. Clearly, petitioners had the burden of proof and failed to carry it. Cf. *Kansas v. Missouri*, 322 U.S. 213 (1944). It is also apparent that their evidentiary shortfall is acknowledged in the brief now before this Court. At page 17, petitioners state:

If a specific finding of the location of the thalweg at the time of Louisiana's admission to the Union or whenever Stack Island was formed is required, a remand to the district court would be appropriate to close the gap.

Obviously, petitioners would embrace a remand of the case to submit additional evidence of some type in an effort "to close the gap."

In the trial court and the Fifth Circuit, respondents argued that the ordinary course of traffic on the river for all pertinent periods of time defines the thalweg, except where a former thalweg has become dead or frozen. An avulsive change occurred in 1881-1882 when the tract of navigation or thalweg of the Mississippi River was suddenly and avulsively diverted from east channel Stack Island Chute on the Mississippi side of Stack Island to the

Louisiana side of Stack Island by the construction of dikes across the head of the chute by the Mississippi River Commission. The thalweg was thus immobilized in east Stack Island Chute, freezing the boundary in that location as to that segment or reach of the river, only. This frozen thalweg connects at the north and south to the live thalweg, as shown on LA-1. After 1909, as reflected by LA-16, LA-16A and the testimony of Mr. Harrison, the river reoccupied the east chute channel. Thus, the live thalweg is in the same position, generally, as the frozen thalweg of 1881-1882 and has remained there to this day.

As a general proposition, the thalweg lies in the middle of the main navigation channel of the Mississippi River as the main navigation channel exists today, subject to the avulsive change which took place in 1881-1882, as described above.

As Louisiana demonstrated through the exhibits offered and the testimony of its witnesses, the live thalweg is defined by the ordinary downstream course of traffic on the river, i.e., the course usually followed by downstream navigation. See *State of Louisiana v. State of Mississippi*, 466 U.S. 96 (1984), at page 79, citing *Iowa v. Illinois*, 147 U.S. at 13; *Minnesota v. Wisconsin*, 252 U.S. at 282. See *New Jersey v. Delaware*, 291 U.S. 361, 379 (1934).

The boundary may become fixed when, by avulsive action, the stream suddenly leaves its old bed and forms a new one. *Arkansas v. Tennessee*, 246 U.S. at 173, 175; *Arkansas v. Tennessee*, 397 U.S., at 89-90.

These cases and legions of others were available to the district court for guidance, but it chose instead to follow the several cases cited at page 3 of the Judgment of

July 3, 1989. The cases have little applicability to the case now at hand, and are based on entirely different facts.

In its bench opinion of June 23, 1989, page 16, the district court concluded that the accretion against the west bank of the river at Lake Providence "is Stack Island in the sense that it is the original island as it originally existed in 1881 plus accretions, less erosion". This holding is clearly erroneous and fundamentally ignores hydrologic and geomorphological changes described by the experts. Basically, the district court held that the island had "moved" from the one land district to another, but was the same island, a physically impossible event.

The effect of the district court decision is to grant to the Mississippi petitioners all accretion along the west bank of the Mississippi River, from above the Town of Lake Providence to miles below the Town of Lake Providence, an area of thousands of acres. Since petitioner's expert, Austin Smith, conceded on cross examination that the accretions to the west bank of the river were in the Red River Land District in Louisiana, across the river from the Choctaw Land District in Mississippi, they are judicially admitted to be in Louisiana. Louisiana's experts also located the accretions in that geographic location, by section, township and range, and by latitude and longitude. However, the district court held these accreted lands on the Louisiana bank to be in Mississippi, disregarding the geographic difference in location by which the accretion is miles away from the patent calls of Island No. 94.

For these reasons and based upon the cited jurisprudence, the opinion of the Fifth Circuit is imminently correct.

II. The Doctrine of Acquiescence

There is substantial testimony in the record concerning use, possession and acquiescence from both witnesses for petitioners and witnesses for respondents, as well as individual Louisiana residents who were sued in the district court.

The bulk of testimony from petitioners was in the form of hearsay and uncorroborated recollections from Mississippi witnesses described by the Fifth Circuit as a "colorful assortment". (937 F.2d at 253) The lower court was both correct and kind in its description. Some of these witnesses claimed to have used the accretion on the west bank for their own purposes and it was obviously in their interest to seek to maintain use, if possible.

According to their testimony, "Jelly" Higgins had run cattle on the island and was aware that other persons unknown to him were planting cottonwood trees; his brother was running goats on the island (Tr. 44); others were hunting on the island (Tr. 49); pulpwood people established a camp (Tr. 50); no fences were present (Tr. 54); the witness was using a Louisiana hunting license (Tr. 54); and Mississippi deer tags (Tr. 55). While he denied that any Louisiana Game Wardens ever exercised jurisdiction on the island (Tr. 57), this was later contradicted in Phase II of the trial by the testimony of several Game Wardens, Joseph Oliveros (U.S. Fish and Wildlife), Michael Murray (Louisiana Wildlife and Fisheries), and Joe Chatman (Louisiana Wildlife and Fisheries) and other witnesses for Louisiana (Tr. 869-959), all of whom enforced Louisiana Law on the accreted area, to the

exclusion of Mississippi claimants, wildlife agents or anyone else from Mississippi. Each testified that they had never seen anyone from Mississippi in the area until the suit was filed.

Mississippi witness Charles Shelton (Tr. 84-113) discussed hunting on the accretion; the fact that some of the accretion was clearly deemed to be in Louisiana; that Louisiana Sheriff Sam House claimed some of the accretion as his own, being attached to his riparian property (Tr. 104); that Sheriff House placed a fence around his claim; and that James Kelly went to jail for growing marijuana on the accretion (Tr. 105). Most of the sketchy information presented dealt not with acquiescence, but with claimed possessory acts.

Louisiana witnesses testified concerning ownership of the accretions to the west bank, use of the property for sand and gravel operations, hunting and other recreational purposes. For instance, Mrs. Vail Delony (Tr. 895-900) testified that she moved to Lake Providence in 1925, married in 1926 and had been on the property at issue many times, hunting there and was familiar with her husband's sand mining operations there. Mrs. Delony testified that only the Delony family hunted on the property and she had never seen anyone else there for that purpose and had never heard of the Houston family until the lawsuit was filed. Mrs. Delony's husband was Speaker of the Louisiana House of Representatives and the family has lived on the property since before the turn of the century.

Mrs. Delony's daughter, Elizabeth D. Reed, also testified (Tr. 869-895), including evidence of the family's

ownership of the riparian lands and the exercise of possession to the waters edge (Tr. 872), produced a Judgment of Possession (proffer LA-83) (Tr. 879-881); timber operations (Tr. 884), hunting leases (Tr. 885); fishing (Tr. 886); timber cutting rights to United States Gypsum Company (Tr. 887); and various other acts of physical possession over the property at issue. It is to be noted that the trial court did not want to allow the testimony of Ms. Reed and sought to prevent it, referring to the earlier Phase I decision by which the court established a boundary between the states. (Tr. 871-880)

Louisiana also called other local witnesses who were familiar with the accretion attached to the west bank at Lake Providence and to establish that they had hunted and fished in the area for many years, virtually all of their lives, without interruption. For instance, Captain Jack Wyly, a Lake Providence attorney born in 1918, testified extensively about his use of the accreted area for hunting and fishing, swimming, etc., testifying that he engaged in these activities commencing sixty (60) years ago (Tr. 556). He also described his father's farming the land (Tr. 561); the gradual development of the accretion along the Louisiana shore (Tr. 562); island formations developing south of the bank accretion (Tr. 563), and generally corroborated the testimony of the Louisiana experts as to the development of the islands and accretion to the west bank. (Tr. 551-585)

Other lay witnesses from the area whose testimony supported the possession, use and occupancy of the accreted lands on the west bank by the Louisiana riparians include Jimmy House (Tr. 534-550); Billy Jack Murray (Tr. 922-926); and Michael Murray (Tr. 905-915), all

Louisiana riparian owners. This last witness, also a Wildlife Agent with the Louisiana Department of Wildlife and Fisheries, grew up in the area and had visited the accretion from 150 to 200 times (Tr. 907). He has hunted there a number of times and enforced Louisiana game laws in that area (Tr. 907-908). He described the accreted area to the west bank (Tr. 909-910); testified that he had enforced Louisiana game laws on the entire accreted area (Tr. 912); had never seen Mississippi Wildlife Agents in the area (Tr. 913); had never seen anyone from Mississippi hunting in the area (Tr. 914); was personally involved in searching for a murderer in the area (Tr. 914); and that the accreted area, referred to as an island, was in fact not a separate island but was attached to the bank, such that one can walk or drive to the accreted area. (Tr. 915)

Joe Chatman, also an Agent with the Louisiana Department of Wildlife and Fisheries, gave similar testimony. (Tr. 915-921)

The testimony of all of these witnesses clearly shows exercise of acts of possession by the Louisiana riparians, to the exclusion of the Mississippi claimants, as well as the exercise of official acts of dominion and jurisdiction by Louisiana Law Enforcement Officials, Wildlife Agents and U.S. Fish and Wildlife (Joseph A. Oliveros). The testimony of the Louisiana witnesses clearly shows that possession or use of the accreted area at issue by the Mississippi claimants was totally unknown to the community on the Louisiana side of the river, as they had never seen anyone from Mississippi in the area. Consequently, testimony of "Jelly" Higgins, Charles Shelton, James B. Kelly, Ronnie Dotson, Robert Jarvis and "Horsefly" Higgins is not credible or worthy of belief. These

Mississippi witnesses testified very generally, gave no particular dates for the activities which they described and could not locate them specifically on a map. In short, their testimony should be given very little weight or should be rejected altogether.

There was no testimony that contradicted the official acts of the Louisiana officials over the accreted area, and none which indicated any recognition by Louisiana of the authority of Mississippi over the area. Moreover, taxes were paid by the Louisiana riparians on the accreted area (LA-37 and stipulation, page 4, *supra*), while the Mississippi claimants paid taxes on the precise geographic area occupied by Island No. 94 as of 1881 (Pl. Ex. 64, J.A. 75, page 4, *supra*). On this point, the Fifth Circuit did not recognize that the certificate of the Chancery Clerk of Issaquena County, Mississippi, (J.A. 75), covered the exact patent location of Island No. 94 (Section 27, T 11 N, R 9 W) and no more. Certainly, no land within the Louisiana land district is covered. At the location described in the tax certificate is found the large "new" island shown on LA-1A, as discussed on page 1 of this brief. Therefore, petitioners are erroneously trying to claim the accretion to the Louisiana bank by showing payment of taxes on a true island in the river pursuant to Pl. Ex. 64. Actually, the southern tip of the large new island barely touches the location of Island No. 94 as of 1881, as shown on LA-1A. Thus, petitioners have apparently been claiming both the large new island and the west bank accretion, thousands upon thousands of acres, by paying taxes on the former location of Island No. 94, 117.96 acres as of 1881. Petitioners have no evidence whatever of the assessment of taxes to them or payment of any taxes on

the Louisiana accretion – those lands are carried on the Louisiana tax rolls, as shown by LA-37 and the stipulation of all counsel, page 4, *supra*.

While there was some testimony of a Mississippi marijuana grower being turned over to Mississippi for prosecuting, as the Fifth Circuit held:

*** a few such isolated incidents do not constitute a "long-continued and uninterrupted assertion of dominion and jurisdiction over an area . . ." *Arkansas v. Tennessee*, 310 U.S. at 571 (1940)

937 F.2d at 253

It should also be noted with regard to the acquiescence issue that LA-16 and LA-16A show that the State of Louisiana, the Fifth Louisiana Levee District and the U. S. Geological Survey determined the boundary-thalweg to be east of Stack Island in the period of 1908-1911. That is the period of the maps, LA-16, a 1911 map, and LA-16A, a 1909 map, both of which clearly depict the downstream track of navigation at those times, based upon a 1908 base map. As shown by the legend information, this cooperative map project was based on a shoreline survey by "State Engineers Surveys", and on river topographical surveys by the "Mississippi River Commission Surveys".

One of the primary missions of the Mississippi River Commission is to determine the topography of the river and, for navigation purposes, the track of navigation. These exhibits show clearly that Louisiana is asserting dominion and jurisdiction over, through and beyond the area claimed by petitioners and is doing so with the active and official participation of the U.S. Government,

through two separate agencies. Petitioners expert witness, Smith, refused to discuss these maps in any detail.

This hardly supports the imperinent argument of petitioners that the Fifth Circuit "finessed the findings with respect to the prescription and acquiescence issue", at page 26 of their brief.

Once again, petitioners offer and argue much law, but steer clear of the detail of evidentiary facts which condemn their argument.

III. The Court Below Did Not Exceed The Proper Scope of Review Under Rule 52(a)

The district court misconstrued and misstated the facts of this case because of its wholesale adoption of the opinion testimony of the Petitioners' sole expert, Austin Smith, that an avulsion occurred in the Mississippi River during 1912 or 1913, causing the main channel to be "gradually enlarged avulsively" to the east, a complete contradiction in terms. There was no evidence to support this erroneous opinion, and the evidence of both petitioners and respondents totally refutes this claim. Particularly, LA-16 and LA-16A show that the downstream track of navigation was already in the east channel by at least 1908, completely refuting Smith's testimony that the floods of 1912-1913 caused a "gradual avulsion". In its eagerness to embrace petitioners' claim and theory of the case, the district court disregarded, solid conclusive pieces of evidence – the MRC report on the Stack Island dike project which was supported by engineering and hydrological data. The MRC report is self-explanatory and not subject to great conjecture. To misconstrue or

disregard the report, as did the district court, is clearly erroneous.

Almost every single finding of the trial court contained in its two opinions are at odds with some facts and evidence in the case. However, the trial court's conclusion that the island was eroding, accreting and migrating, and by 1954 had moved out from under any portion of the superimposed original island and therefore had disappeared is a correct finding.¹² Clearly, the island did move away from its 1881 location, eventually washed away and disappeared.¹³ As Louisiana's experts testified, alluvion from far upstream deposited against the west bank, creating bank accretion. This accretion is in no sense, factually or legally, the remnants of Stack Island.

¹² See bench opinion of June 23, 1989, page 16.

¹³ Under Mississippi Law, where an island increases by accretions, a riparian owner cannot claim any part extending beyond the boundaries of his own land. *Archer v. Southern Ry. Co. in Mississippi*, 114 Miss. 403, 75 So. 251 (1917). See also *Houston v. United States Gypsum Co.*, 569 F.2d 880 (5th Cir.), rehearing denied, 580 F.2d 815 (5th Cir. 1978) wherein the Fifth Circuit held that under Mississippi Law, a riparian owner may not follow his accretions after they encroach upon the lands of another, and that it was error for the trial court, as here, to fail to explicate its decision in determining adverse possession under the standards of decisions of the Mississippi Supreme Court, at 887. In *McGill v. Thrasher*, 221 Ky. 789, 299 S.W. 955 (1927) and *Nugent v. Mallory*, 145 Ky. 824, 141 S.W. 850 (1911), the courts have also held that the owner of an island under patent is without title to the island beyond his patent calls, precisely what petitioners are attempting hereby claiming accretion in another land district!

While this important set of facts is but one of many within the case, it became obvious to the Fifth Circuit that the district court did not have a grasp of or else totally disregarded the inherent contradictions and inconsistencies between petitioners' expert, Austin Smith, and other documentary and testimonial evidence which is a part of the record.

The Fifth Circuit correctly analyzed applicable rules of law pertaining to the rule of thalweg and its exceptions arising out of avulsive actions, as well as slow and gradual changes in the identity of the thalweg, citing *Iowa v. Illinois*, 147 U.S. 1 (1893); *Louisiana v. Mississippi*, 466 U.S. 96 (1984); and the island rule arising out of *Missouri v. Kentucky*, 11 Wall. 395 (1870), and resulting in *Hogue v. Stricker Land & Timber Co.*, 69 F.2d 167 (5th Cir.), cert. denied, 293 U.S. 591 (1934). After analyzing the applicable legal principles, the court applied a two-step analysis to resolve factual disputes in the case. The Fifth Circuit then stated that:

We conduct this inquiry against the backdrop of the clearly erroneous standard, giving due regard to the trial judge's assessments of the witnesses' credibility. See Fed. Rule of Civ. Pro. 52(a).

937 F.2d at 250, 251

At page 27 of petitioners' brief, it is stated that the Fifth Circuit "misunderstood" the clearly erroneous standard, although as cited above, the Fifth Circuit conducted its inquiry against the backdrop of the clearly erroneous standard. The Fifth Circuit analysis of the evidence in the record, as contrasted to that relied upon by the district court, plainly shows that the clearly erroneous standard

was followed. Petitioners do not want this to be so and seek to argue around the lower court's analysis.

For instance, the Fifth Circuit opinion states, in part, that " * * * it is apparent that Smith disregarded the only conclusive pieces of evidence in formulating his opinion". 937 F.2d at 251. The Fifth Circuit then goes on to discuss the Congressionally-funded MRC construction project, explained by respondents' witnesses, Harrison and Easterly, and offered into evidence as LA-18A. (J.A. 143)

The opinion also finds that the district court ignored hydrographic data contained in the study as well as the textual explanation of the project, describing the location of the east chute channel as the "main channel" at the time of the December 1881 survey.

Petitioners argue that because the Fifth Circuit cited *Staufer Chemical Co. v. Brunson*, 380 F.2d 174, 181 (5th Cir. 1967), that analysis under the clearly erroneous standard is made "inherently suspect". Instead, petitioners prefer the "new precision" of *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), holding, essentially, that a finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. 470 U.S. at 574. The Fifth Circuit found that the evidence relied upon by the district court did not support its conclusions.

Petitioners suggest at page 27 of their brief that the Fifth Circuit is stating that it has weighed the evidence differently than the district court and such is not enough for reversal.

Actually, as referred to above, the Fifth Circuit stated, in part, that:

- (1) It is apparent that Smith disregarded the only conclusive pieces of evidence in formulating his opinions (937 F.2d at 251);
- (2) The district court ignored the language of the MRC report and the hydrographic data contained within it (937 F.2d at 251);
- (3) The evidence relied upon by Mississippi, Smith, and ultimately the district court simply does not contain the type of data necessary to support a conclusion contrary to the official government report (937 F.2d at 251); and
- (4) After reviewing the facts upon which Smith and the court relied, stated that the district court clearly erred in relying upon evidence, that regardless of its veracity, could not support its finding (937 F.2d at 251).

This clearly states the court's definite and firm conviction that a mistake has been committed by the district court and that its finding was clearly erroneous. The Fifth Circuit is clearly not duplicating the role of the lower court, but has found that there is no evidence to support its decision as explicitly articulated at pages 251 and 252 of the appellate decision. Again, the Fifth Circuit is not merely saying that there are two permissible views of the evidence or that there is some evidence to support the district court decision, but that both Smith and the district court disregarded the only conclusive evidence, resulting in an opinion based upon evidence which is absent the data necessary to refute an official government report entered into the Congressional Record. For the

Fifth Circuit to have held otherwise, it, too, would have had to disregard the MRC report.

At page 35 of petitioner's brief, it is stated that the trial court made two conclusive, ultimate findings of fact that control the case, and that neither is vulnerable under the clearly erroneous standard. One conclusion is that the trial court found the "land mass" lies in the State of Mississippi, and the other is that if the land be not in Mississippi because of the thalweg-boundary, then it is in Mississippi under the doctrine of acquiescence.

Contrary to petitioner's assertions, these two conclusions are absolutely vulnerable in that there is absolutely no evidence to support them. It is not just that there might be two permissible views of the evidence, but rather that it is not reasonably conceivable that these findings can be correct in any regard. The first finding concerning the land mass implies that a 117.96 acre island on one side of the river has floated to the other side of the river to a different geographic location outside the patent calls and become assimilated into the bank as more than 4000 acres.¹⁴ The second finding not only implies, but mandates that the State of Mississippi, as a sovereign, has taken some action to exercise dominion and jurisdiction over the accreted area on the west bank, and there is no evidence whatsoever to support this. Moreover, the greater volume of evidence shows just the opposite: that Louisiana officials exercised full and unchallenged dominion and jurisdiction for land sales, property transfers, taxation, police authority and wildlife and fisheries

¹⁴ Bench opinion of June 23, 1989, page 16.

regulation for all known periods of time. The sole exception: a marijuana grower was said, by hearsay testimony of Mississippi witnesses, to have been turned over on one occasion to a Mississippi authority. This single act, even if actually true, does not lead to sovereign acquiescence by Louisiana. The great bulk of the evidence is squarely against this proposition.

As discussed above, the certificate of the Chancery Clerk of Issaquena County specifically stated that any taxes paid by petitioners were for lands located on the east bank of the river within the Choctaw Land District in Mississippi, that being the historic location of Island No. 94. Not one single witness for petitioners ever testified that he thought that he was paying taxes on land accreted to the west bank within the Red River Land District of Louisiana, nor were any documents introduced to this effect.

The record as a whole does not contain evidence to support the findings of the district court. The preponderance of the evidence and the greater authority of the evidence submitted by respondents is clearly against petitioners. No reasonable view of the evidence would lead to the conclusion that the ultimate findings of fact of the district court was a "permissible view" of the evidence. The decision of the district court was plainly wrong and is clearly erroneous.

IV. Jurisdiction Over Louisiana's Third Party Complaint Against Mississippi

This section addresses the question formulated by the Court in its order of March 23, 1992, granting certiorari, as follows:

Did the district court properly assert jurisdiction over respondent's third-party complaint against petitioner State of Mississippi?

Respondents agree with the three issues identified by petitioners arising out of the jurisdictional question, at page 36 of their brief, and will treat each briefly below. Petitioners have also provided a detailed summary of respondents' efforts to have this court assume original jurisdiction under Article III, Section 2 of the United States Constitution and 28 U.S.C. 1251(a) in their statement of the case, pages 2 et seq. It is also pointed out that respondents' petition for rehearing of the Louisiana motion to file complaint was denied by the Court by order of February 27, 1989. Thus, the Court has had an opportunity to consider the jurisdictional questions presented on two prior occasions.

With regard to the several different issues raised by the jurisdictional question, respondents comment on each, as follows:

- (1) Does the grant to this Court, in 28 U.S.C. 1251(a), of "original and exclusive jurisdiction of all controversies between two or more States" preclude all other courts from taking jurisdiction of a controversy between two states?

The simple answer is that whatever counsel may think and whatever the commentators may think, it is the law of this case and the law of this Court that it has the discretion to determine whether to invoke its original jurisdiction in suits between states pursuant to Section 1251(a), and it can and has refused leave to file if the issues are subject to resolution in an appropriate forum.

Petitioners have cited the appropriate cases for this proposition, including *Arizona v. New Mexico*, 425 U.S. 794 (1976), also cited by Justices White, Stevens and Scalia in their dissent to the denial of Louisiana's motion to file a bill of complaint in this case. *Louisiana v. Mississippi*, 488 U.S. 990 (1988).

Consequently, the Court must have concluded at the time of its denial of the Louisiana motion that there was an appropriate alternative forum in which this dispute could be resolved, that forum being the District Court for the Southern District of Mississippi, the decision of which is now here on certiorari. This, however, does not suggest that the decision on the motion establishes that the district court properly asserted jurisdiction over the dispute between the two states, merely that the majority thought that the district court was at least another forum where the case could be heard. As suggested at page 44 below, the Court may decide to re-visit this issue with a view toward exercising original jurisdiction less sparingly in controversies between states where the issues are not clearly subject to resolution by an alternative forum.

- (2) Was Louisiana's third-party claim against Mississippi within the jurisdiction of the district court?

The district court had jurisdiction over the original suit between the private parties on the basis of diversity of citizenship, and also had jurisdiction over Louisiana's claim in intervention and third-party complaint against Mississippi, provided that it could draw a boundary without affecting title to land in another state. *Durfee v. Duke*, 375 U.S. 106, 115 (1963).

As to federal-question jurisdiction, Louisiana relied upon 28 U.S.C. 1331, asserting that its rights arise under the Constitution of the United States, the Act of April 6, 1812, admitting Louisiana into the Union, and the Treaty of Peace, "Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., 8 Stat. 80", between the United States and Great Britain, all proper bases of federal-question jurisdiction.

Louisiana also claimed intervention as a matter of right, which is correct under Rule 24(a)(2) of the Federal Rules of Civil Procedure, when there is a claim of an interest relating to property, as here.

Consequently, Louisiana's intervention and third-party complaint were properly before the Court under the cited statute and rule, as set forth in the motion for intervention in the district court (J.A. 5). Petitioners thoroughly and correctly analyze these jurisdictional issues, to this point.

- (3) If the land in question is, as the Fifth Circuit found, in Louisiana, does that mean that the district court lacked power to exercise jurisdiction over it?

This issue was discussed with the district court at the outset, argued in Louisiana's motion for separate trial of the interstate boundary issue¹⁵, raised at page 2 of the

¹⁵ J.A. 34. Louisiana argued in its memorandum in support of its motion for separate trial of the interstate boundary issue that: "The determination of the legal boundary between the states by the Court will determine the limits of the jurisdiction of the Court, and may result in a determination that the ownership of the property in question is outside the limits of the Court's jurisdiction."

petition for rehearing of Louisiana's motion to file complaint, and at page 9 of its brief in support of petition for rehearing. Justices White, Stevens, and Scalia also noticed this issue in the dissent from the Court's denial of leave to file a bill of complaint. 488 U.S. at 991.

Clearly, there is a problem with a district court in one state making findings which directly affect title to land in other states. As suggested to the district court, in order for it to take jurisdiction of the matter, it would be compelled to pre-judge the extent of its jurisdiction prior to hearing the first witness or seeing the first item of evidence. That is, the district court would be called upon in the case of a river boundary dispute such as this to ascertain the limits of its jurisdiction vis-a-vis the interstate boundary in order to determine whether the accretion to the west bank of the river was within its jurisdiction in the first instance.

The district court had no difficulty with this dilemma and held that in the event it was wrong in its conclusion that the boundary thalweg lay west of Island No. 94 in the year that it was patented, alternatively, it would conclude that the disputed lands belonged to Mississippi under the doctrine of acquiescence, as noted by the Fifth Circuit. 937 F.2d at 253. Parenthetically, in order to even proceed with the case, the district court was required to determine that accretions to the west bank of the Mississippi River were within the territorial boundaries of the

State of Mississippi and, thus, within the jurisdiction of the court to hear and determine.¹⁶

On this point, the law of this Court is quite clear "that courts of one State are completely without jurisdiction directly to affect title to land in other States." *Durfee v. Duke*, 375 U.S. 106, 115 (1963). Petitioners, however, have constructed a circular argument at page 47 of their brief, contending that although the literal language of *Durfee* supports such a result, a district court would therefore be without jurisdiction to affect title to land in other states, and it should not be the law that the jurisdiction of a district court turns on what result it reaches on the merits of a dispute that is before it.

Petitioners' argument props itself up by arguing that a court achieves full jurisdiction by presuming to exercise jurisdiction, regardless of the nature of the dispute or the extra-territorial location of the land, as here. This cannot be correct.

It is argued that if the district court or a higher court found that the land was on the Louisiana side of the boundary, then the Mississippi district court would be without jurisdiction and its judgment would be a nullity. However, this ignores the fact that if the district court in

¹⁶ The district court decided the interstate boundary issue on Phase I of the bifurcated trial without hearing all of the witnesses and evidence, making it difficult for Louisiana counsel in Phase II to question witnesses concerning the boundary, possession and acquiescence. (Tr. 871-872) Moreover, the district court would not allow the introduction of LA-83, showing legal and historic title of a Louisiana resident to the accretion on the west bank claimed by petitioners. (Tr. 879)

this case had properly found the land to be on the Louisiana side of the boundary, then such land would be subject only to the disposition of Louisiana courts. The Mississippi court would not then have made an award of the land to petitioners. If, on the other hand, a district court decides in favor of local residents, but is wrong and the decision is reversed on appeal, the disposition of the extra-territorial land and the proper location of the boundary is a matter for the higher court. A reversal on appeal does not override the rule of jurisdictional finality, but is a part of the process, simply resulting in a final and definitive decision as to the location of the thalweg-boundary, the accreted lands and the newly formed island in the river adjacent to the location of original Island No. 94.

In this regard it should be remembered that in *Durfee*, the issue was title to the land as between parties to the litigation and did not affect the states with respect to the location of the boundary between them, as is now before the court in this case.

In the current case, the district court judgment finds that the accretion to the west bank of the Mississippi River at Lake Providence is actually "Stack Island" in the sense that it is the original island as it originally existed in 1881 plus accretions less erosion."¹⁷ Based upon this erroneous finding, the district court awarded these accreted lands to petitioners.

¹⁷ Bench opinion of June 23, 1989, page 17. This implies that the district court has authority to construct a new property description, although it conflicts with existing ownership(s) in the geographic location, Louisiana.

Had the district court concluded that these accreted lands actually lie in Louisiana, based upon a correct analysis of the location of the thalweg-boundary, it should have denied the claims of petitioners and made no award of the lands.

Therefore, the rule of *Durfee* concerning the jurisdiction to affect title to land in other states and the rule of jurisdictional finality are given support and not negated by a finding that the district court made an erroneous decision or lacked power to exercise jurisdiction over land in Louisiana located west of a proper thalweg-boundary.

It is submitted that in this case the district court lacked power to exercise jurisdiction over the land in question.

It seems to this writer that the clear language of 28 U.S.C. 1251(a), not to mention Article III, Section 2, Clause 2 of the Constitution, mandates this Court to hear and determine controversies of this type between states and that no other court has such authority. It would seem that the jurisdiction in this area is, indeed, "original and exclusive" for the Court, so as to avoid a "meandering through the Courts", as alluded to by the Fifth Circuit. Heretofore, of course, the Court has imposed prudential and equitable limitations upon the exercise of its original jurisdiction, making it obligatory only in appropriate cases. The difficulty, of course, is in determining which controversies are truly suitable for resolution in an alternative forum.

Initially, a majority of this Court felt that there was a suitable alternative forum, over the dissent of three Justices who argued to the contrary. Now, following a trial and appeal, it appears that the issues were not clearly subject to resolution in the district court. *Wyoming v. Oklahoma*, 112 S.Ct. 789, 799 (1992). As a consequence, the matter is now before the Court for the third time.

Perhaps boundary cases between states are one type of controversy where, ultimately, final adjudication and relief may be had only before this Court? This should be the rule, for surely the "seriousness and dignity of the claim" between states as concerns their sovereign boundaries justifies exercise by the Court of its original jurisdiction. *Id.*, 112 S.Ct. 798.

It is submitted that it would be in the interest of judicial economy for the overall federal system for the Court to more frequently invoke its original jurisdiction in matters of this type, assigning the trial of the case to a special master, and thus avoiding multiple motions to file bills of complaint, trials in the lower courts, the obligatory appeals, and, finally, the petition for writ of certiorari by one of the parties. This long process surely burdens the overall federal judicial process and involves, finally, the precious time of this Court at the conclusion.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed. The lower court correctly found from the entire record of the case that the district court had erred in concluding that the boundary thalweg lay west of Island No. 94 in

the year that it was patented, improperly applied the doctrine of acquiescence to its factual findings and failed to properly locate the boundary thalweg in the east channel where it lay at the time of patent in 1881. There is no reason to remand to the trial court for findings with respect to the location of the boundary-thalweg on the dates of state sovereignty, since all available evidence is now before the Court. While petitioners failed to submit evidence for the times of sovereignty, Island No. 94 did not come into existence until 1879, just prior to the U.S. patent of the island in 1888, and this is the relevant time for determination of the boundary. A remand of the case would simply result in a new trial and appeals, ultimately bringing the case back to this Court.

Respectfully submitted,

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